

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554**

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**FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY**

In re Applications of)	WT Docket No. 96-41	
Liberty Cable Co., Inc.)		
)		
For Private Operational Fixed	)	File Nos.:	
Microwave Service Authorization and	)	708777	WNTT370
Modifications	)	708778, 713296	WNTM210
	)	708779	WNTM385
New York, New York	)	708780	WNTT555
	)	708781, 709426, 711937	WNTM212
	)	709332	(NEW)
	)	712203	WNTW782
	)	712218	WNTY584
	)	712219	WNTY605
	)	713295	WNTX889
)	713300	(NEW)
)	717325	(NEW)
)		

To: The Honorable Richard L. Sippel
Administrative Law Judge

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**THE WIRELESS TELECOMMUNICATIONS BUREAU'S COMMENTS
ON JOINT MOTION TO ENLARGE ISSUES**

On July 12, 1996. Time Warner Cable of New York City and Paragon Cable Manhattan (collectively Time Warner) and Cablevision of New York City - Phase I (Cablevision) filed a Joint Motion to Enlarge Issues (Joint Motion). The Chief, Wireless Telecommunications Bureau (Bureau), by her counsel, hereby submits Comments to the Joint Motion.

1. Time Warner and Cablevision (collectively referred to as the Petitioners) argue that an additional issue should be added to determine whether Behrooz Nourain and Peter Price, specifically, and anyone else at Liberty Cable Co., Inc. (Liberty) generally, have made any

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misrepresentations or omissions, and/or violated the duty of candor in sworn testimony in this proceeding. Time Warner and Cablevision base their assertion on the fact that a memorandum which was prepared by Liberty's FCC counsel and sent to Price and Nourain lists the captioned applications as pending, but which Liberty had already commenced service. The petitioners, therefore, allege that the testimony given by Messrs. Price and Nourain about when they learned of Liberty's premature operation is false.

2. Through discovery on the designated issues, Liberty produced a memorandum dated February 24, 1995, prepared by Michael J. Lehmkuhl, one of Liberty's FCC counsel (Lehmkuhl Memo). Attached to the Lehmkuhl Memo is an inventory of all of Liberty's 18 GHz applications and licenses with the status of each path marked with either a "P" for "pending," or a "G" for granted. Both Messrs. Price and Nourain are named as recipients of the Lehmkuhl Memo.¹

3. Discovery in this proceeding has demonstrated that certain reports were created weekly by Liberty to indicate progress in installing microwave service to buildings.² The reports initially had no information concerning the status of any applications filed with the Commission, but instead only listed information relating to the installation of service and the number of customers in each building.

4. Time Warner and Cablevision in their Joint Motion argue that because Mr. Price received copies of the weekly reports listing buildings which were placed into operation, and because Mr. Nourain was the individual responsible for actually activating the microwave paths, that at the time each received a copy of the Lehmkuhl Memo, each of these two individuals knew

¹ A copy of the Lehmkuhl Memo is attached to the Petitioners' Joint Motion as Exhibit 3.

² A copy of such a weekly report is attached to the back of Exhibit 4 to the Petitioners' Joint Motion.

the microwave paths requested in the 13 captioned applications were activated prematurely. Therefore, the Petitioners argue, because Messrs. Price and Nourain knew about the unauthorized activation in February 1995 when they received the Lehmkuhl Memo, they testified untruthfully when they stated they did not learn about the operation of facilities without a license until late April or early May 1995. Accordingly, the Petitioners request that an issue be added concerning whether Liberty, Peter Price, or Behrooz Nourain misrepresented facts during this proceeding.

5. The Bureau cannot support the addition of the requested issue because Issue number three of the designated issues in the Hearing Designation Order seeks

[t]o determine whether Liberty Cable Co., Inc., in relation to its interconnection of non-commonly owned buildings and its premature operation of facilities, misrepresented facts to the Commission, lacked candor in its dealings with the Commission, or attempted to mislead the Commission, and in this regard, whether Liberty Cable Co., Inc. has violated Section 1.17 of the Commission's Rules, 47 C.F.R. § 1.17.

Hearing Designation Order and Notice of Opportunity for Hearing, FCC 96-85, ¶ 30(3) (released March 5, 1996). Therefore, an issue concerning Liberty's candor and truthfulness has *already* been designated. If Messrs. Price and Nourain have made any intentional misstatements about when they learned about the premature operation of facilities, such misstatements would be included in the above designated issue. Accordingly, there is no need to add a further issue.

6. The Bureau acknowledges that it has recently filed along with Liberty a Joint Motion for Summary Decision in which the Bureau and Liberty request the presiding Administrative Law Judge to find that there remains no issues of fact concerning the designated issues, including the third issue. Therefore, because the issue that Time Warner and Cablevision seek to add by their Joint Motion is fully encompassed within the third designated issue, the Petitioners' July 12,

1996, pleading is in essence an early-filed opposition to the Bureau's and Liberty's Joint Motion for Summary Decision.

7. This is not to say, however, that the Bureau does not believe that the allegations raised by the Petitioners in their Joint Motion are not serious. Indeed, anytime credible evidence is brought forth challenging an applicant's truthfulness, the Bureau will take the matter seriously. *See, e.g., Policy Regarding Character Qualifications in Broadcast Licensing*, 102 FCC 2d 1179 (1986). However, there are several factors which are unknown at this time which are crucial in making a determination of whether Messrs. Price and Nourain knew about the activation of microwave paths without Commission authorization prior to April 1995. Those factors include whether they actually received copies of the Lehmkuhl Memo, whether they read it after receiving it, and whether they made any of side-by-side comparisons of the paths listed in the Lehmkuhl Memo and the paths listed in the weekly reports.³ Lacking this information, the Bureau cannot support any conclusion that either Price or Nourain misrepresented facts.⁴

8. However, given the magnitude of the allegations and the fact that the allegations relate to an already designated issue which is a part of a pending Joint Motion for Summary Decision, the Bureau believes that if the presiding officer has any questions concerning the facts raised by Time Warner and Cablevision, the presiding officer can conduct limited discovery to resolve

³ Because Liberty operates so many paths, the Bureau believes that if Price and Nourain read the Lehmkuhl Memo they would not necessarily remember whether the paths listed in that memo had been activated or not. Therefore, a comparison with the weekly reports which list the activated paths would have to be made.

⁴ The information regarding this issue which the Bureau currently lacks is the type of information which would be only in the possession of Liberty. Accordingly, depending upon the content of Liberty's response to the Petitioners' Joint Motion, the presiding judge should be able to determine to what degree there are questions remaining concerning the veracity of Mr. Price's and Mr. Nourain's testimony.

those questions. Section 1.243 of the Commission's Rules allows the presiding officer to take depositions and to require the presentation of oral argument with respect to any question for which he will be required to rule upon. 47 C.F.R. §§ 1.243(e), (g).

9. The Bureau believes that because the question presented by the Petitioners is very narrow (whether Messrs. Price and Nourain misrepresented facts about when they learned of Liberty's premature operations), discovery on the issue could be completed in a single day. The Bureau believes that at most, three witnesses would need to be called -- Michael Lehmkuhl, Peter Price, and Behrooz Nourain. The Bureau additionally believes that discovery would be best conducted by the presiding officer rather than left to the parties to ensure that the process is orderly and the questioning does not stray beyond the narrow issue raised.

10. The Bureau stresses, however, that nothing in these Comments are meant to represent that the Bureau has changed its position on the Joint Motion for Summary Decision. The Bureau maintains its position asserted in that pleading that there remains no genuine issue of material fact for determination at the hearing. The Petitioners' Joint Motion was filed on Friday, July 12, 1996. The Bureau's and Liberty's Joint Motion for Summary Decision was filed on Monday, July 15, 1996, which did not afford the Bureau sufficient time to review the Petitioners' Joint Motion prior to completing the joint filing with Liberty.

11. The Petitioners also request that an issue be added of whether any of Liberty's existing authorizations should be revoked based upon the findings with respect to the issue of

⁵ Although the documentary materials cited to in Time Warner's and Cablevision's Joint Motion were also produced on the Bureau at the same time Liberty produced them to the Petitioners, the Bureau did not focus on the contents of the materials and the implications of the various dates listed therein in the same manner as did the Petitioners.

whether Mr. Price or Mr. Nourain testified untruthfully as to when they learned about the premature service by Liberty. The Bureau believes that this requested issue far exceeds the parameters of the Hearing Designation Order in this proceeding. All that is before this tribunal are the captioned applications. Accordingly, the presiding officer does not have the authority to revoke licenses not a part of this proceeding.

12. In conclusion, because the questions raised by Time Warner and Cablevision in their Joint Motion is already included in the third designated issue, there is no need to add a further issue to this proceeding. Moreover, there is currently pending a Joint Motion for Summary Decision in which the Bureau and Liberty argue that there remains no issues to be tried in this proceeding. The Petitioners' Joint Motion is more suitably treated as an opposition to this Joint Motion for Summary Decision. Nothing in the Joint Motion convinces the Bureau to change its stance with respect to the Bureau's support of summary decision in this proceeding. However, the Bureau does acknowledge that candor is always a serious issue and if the presiding officer has any questions concerning the veracity of either Mr. Price or Mr. Nourain, limited discovery can be conducted on that narrow issue.

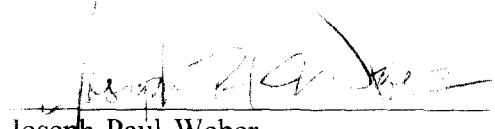
For the foregoing reasons, the Chief, Wireless Telecommunications Bureau, respectfully requests that the Joint Motion to Enlarge the Issues filed by Time Warner and Cablevision be denied.

Respectfully submitted,

Michele C. Farquhar
Chief, Wireless Telecommunications Bureau

July 22, 1996

By:


Joseph Paul Weber
Katherine C. Power
Mark L. Keam
Trial Attorneys

Wireless Telecommunications Bureau
Enforcement Division
2025 M Street, N.W., Room 8308
Washington, D.C. 20554

Telephone: 202-418-0569
Facsimile: 202-418-2644

CERTIFICATE OF SERVICE

I, Mark Keam, in the Enforcement Division, Wireless Telecommunications Bureau, certify that I have, on this 22nd day of July, 1996, caused to be served copies of the foregoing **"The Wireless Telecommunications Bureau's Comments on Joint Motion to Enlarge Issues"** to:

The Honorable Richard L. Sippel
Administrative Law Judge
2000 L Street, N.W., Suite 220
Washington, D.C. 20554

Robert L. Begleiter, Esq
Constantine & Partners
909 Third Avenue
Tenth Floor
New York, NY 10022

Robert L. Pettit, Esq.
Wiley, Rein & Fielding
1776 K Street, N.W.
Washington, D.C. 20006

R. Bruce Beckner, Esq.
Fleishman and Walsh, L.L.P.
1400 Sixteenth Street, N.W., Suite 600
Washington, D.C. 20036

Christopher A. Holt, Esq.
Mintz, Levin, Cohn, Ferris, Glovsky and Popeo, P.C.
701 Pennsylvania Avenue, N.W., Suite 900
Washington, D.C. 20004

July 22, 1996

Mark L. Keam